VALIDITY OF A DEVISE OVER AFTER AN ESTATE WITH A PROVISO COMPELLING ALIENATION.—Devisees or bequests of "what is undisposed of" after the estate of the first beneficiary, are variously construed by the courts. 8 COLUMBIA LAW REVIEW 330. Whether the gift over is an executory devise after a fee, or whether a remainder after a life estate with power of disposal, is important since, by the weight of authority, in the latter form only is it valid. *Kent* v. *Morrison* (1891) 153 Mass. 137; *Kelley* v. *Meins* (1883) 135 Mass. 231; *Van Horne* v. *Campbell* (1885) 100 N. Y. 287. A contrary result was reached in a recent case in Texas, *Littler* v. *Dielmann* (1908) 106 S. W. 1137, conforming to prior decisions. 8 COLUMBIA LAW REVIEW 330. A gift over in case of remarriage, of what remained of a widow's absolute estate, was upheld as a valid executory devise. The reason given in *Ide* v. *Ide* (1809) 5 Mass. 500—which with *Jackson* v. *Bull* (1813) 10 Johns. 19, is the basis of the American decisions —for holding the executory limitation void, is that it is inconsistent with the absolute property in the first devisee: absolute because of the superadded power to dispose free from the limitation over. *Ide* v. *Ide, supra,* rests upon the authority of *Att'y Gen'l* v. *Hall* (1731) Fitz. 314; S. C., W. Kel. 13. There the devise (realty and personalty) was to H. and the heirs of his body, and if he should die leaving no heirs of his body, then so much of the property as he should be possessed of at death, to a charity. It was held that the will gave H. the absolute ownership of the personalty. This absolute ownership in H. resulted from the old rule that future estates, after a bequest of personalty, were not allowed, whether by way of remainder, *Anon.* (1641) March, 106, pl. 183, or by executory devise. Gray, Perpetuities (2nd Ed.) § 80. It did not result because of any inconsistency due to the limitation over. The court in *Ide* v. *Ide, supra,* evidently stumbled over the statement, "It is giving a man a sum of money to spend and limiting over to another what does not happen to be spent." Yet is this anything more than an interpretation of the provisions of the will from which the absolute property in H. was inferred? 2 Fearne, Cont. Rem. (4th Ed.) 227. The express power of disposal merely prevented the reading in by implication of a bequest of only the "use." Cf. *Hide* v. *Parrat* (1696) 2 Vern. 331. *Ide* v. *Ide, supra,* with its reason of "repugnancy" may be impeached on another ground. As shown in *Kelley* v. *Meins, supra,* the courts find nothing repugnant in the case of a life estate with power of disposal, remainder over of what is unspent. This repugnancy may possibly exist where there is an absolute bequest with a gift over upon the sole contingency of the first taker spending or not. But the latter is not the case of *Ide* v. *Ide, supra,* for there the expressed contingency was "dying without lawful heirs"; that event performs the precise function that the event of death of the life tenant does—it gives over the estate. In each case alike, the spending only measures the quantum of the estate over. The nature of the bequest over should make no difference. Cf. *Bohlman* v. *Lohman* (1885) 79 Ala. 63. In *Jackson* v. *Bull, supra,* Chancellor Kent gives a reason for holding the executory devise bad, different from that in *Ide* v. *Ide, supra.* His rule is that any executory devise depending upon a contingency which it is in the

power of the first taker to prevent happening, is void. In *Jackson* v. *Robins* (1819) 16 Johns. 537, he is more explicit: he recognizes that every such devise is to some extent dependent upon the will of the first taker, e. g., where the contingency is marriage, but distinguishes these cases as lying without the purview of his rule; it is the power to dispose of the property so as to free it from the burden of the devise over, and thus defeat that devise, which renders the latter void. This reason for his rule, like that in *Ide* v. *Ide, supra,* would logically destroy a remainder after a life estate with power of disposal, as well as an executory devise where the contingency is not the spending itself. In each alike, the power is destructive of the substance of the gift over. Chancellor Kent does not distinguish between tangible property and rights in property. See Digby, Real Prop. 304, n. 2. The sale destroys the former but not the latter. Otherwise a life tenant by exercising a power of sale, could defeat a vested remainder. [The power of disposal does not render the remainder contingent. *Burleigh* v. *Clough* (1872) 52 N. H. 267.] Not only is Chancellor Kent's reason unsound, but the rule itself. This latter fact Prof. Gray has clearly pointed out. Restraints on Alienation (2nd Ed.) § 69. An executory devise is, indeed, indestructible by the first taker. 2 Fearne, Cont. Rem. 51. That is, he cannot prevent the executory devise from vesting if the contingent event ever happens. But that does not mean that the contingent event itself may not be within his power.

In New York the Real Property Statutes recognize the existence of expectant estates which may be defeated by any act or means that the party creating them shall have authorized. 3 N. Y. R. S. 217 §§ 32, 33. *Greyston* v. *Clark* (1886) 41 Hun 125 and *Leggett* v. *Firth* (1889) 53 Hun 152 regarded these sections as validating executory devises of the kind above discussed, for the statute clearly applied. In the latter case on appeal, (1892) 132 N. Y. 7, the Court of Appeals said that the devise over was not void, even though defeasible by the first taker. It construed the first beneficiary's estate to be only a life interest upon the authority of *Terry* v. *Wiggins* (1872) 47 N. Y. 512. The latter case adopted the same construction, apparently on the ground that an executory devise would be void as repugnant. A strong dictum of the Court of Appeals in *Leggett* v. *Firth, supra,* repudiated this last result but ignored *Terry* v. *Wiggins* on this point. The latter case would seem to nullify the provision of the statute that expectant estates shall not be void because thus liable to be defeated. If correct, the statutes have left the old rule intact. The last decision is *Kelley* v. *Hogan* (1902) 71 App. Div. 343, where the first taker could dispose of the property not only by deed but also by will. It was held that in the face of such an absolute power of disposition the statute could not save the devise over. Such a distinction has no basis in the statute, and leaves the law in New York uncertain.

PROPERTY OF A NON-RESIDENT DECEDENT UNDER THE NEW YORK TRANSFER TAX ACT.—Legislatures in taxing the privilege of acquisition by will or inheritance, see 7 COLUMBIA LAW REVIEW 293, commonly include transfers from a non-resident decedent, of property within the State. Cf. N. Y.